

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WAPATO HERITAGE, LLC, a  
Washington Limited Liability  
Company; KENNETH EVANS; JOHN  
WAYNE JONES; and JAMIE JONES,  
individual residents of  
Washington State,

Plaintiffs,

v.

SANDRA D. EVANS, an  
individual, not a resident of  
Washington State; and DAN  
GARGAN, a citizen of Arizona,

Defendants.

NO. CV-07-0314-EFS

**ORDER GRANTING AND DENYING IN  
PART NON-PARTY WITNESS MARY T.  
WYNNE'S MOTION FOR PROTECTIVE  
ORDER**

Before the Court, without oral argument, is non-party witness Mary T. Wynne's Motion for Protective Order. (Ct. Rec. [227](#).) Ms. Wynne asks the Court to limit Plaintiffs' discovery requests by 1) limiting the production of documents, 2) eliminating multiple depositions, 3) requiring compliance with Federal Rule of Civil Procedure 45, 4) requiring payment of Ms. Wynne's discovery costs by Plaintiffs, 5) restricting the disclosure of protected information, and 6) delaying Ms. Wynne's deposition. Plaintiffs oppose the motion. After reviewing the submitted material and relevant authority, as well as the Court's March 6, 2006 Order Granting and Denying in Part Discovery Motions and

1 Granting Ms. Wynne's Motion to Withdraw (Ct. Rec. [246](#)), the Court is  
2 fully informed. For the reasons given below, the Court grants and denies  
3 in part Ms. Wynne's motion.

4 **A. Background**

5 Ms. Wynne, who represented Defendant Sandra Evans in connection with  
6 the drafting and execution of the Settlement and Release Agreement,  
7 appeared as counsel for Ms. Evans in this action on September 30, 2008.  
8 (Ct. Rec. [158](#).) Plaintiffs' counsel indicated a desire to depose Ms.  
9 Wynne, and began discussions in early January 2009 to establish a date  
10 for Ms. Wynne's deposition. Although Ms. Wynne agreed to a deposition  
11 in Seattle, Washington, she objected to the January 15, 2009 subpoena  
12 duces tecum.

13 On February 25, 2009, the Court held a hearing to resolve a number  
14 of discovery motions and on March 6, 2006, entered an Order memorializing  
15 and supplementing its oral rulings. (Ct. Recs. [240](#) & [246](#).) As indicated  
16 below, the Court's Order addressed many of the issues raised by Ms.  
17 Wynne's Motion for Protective Order and also granted Ms. Wynne leave to  
18 withdraw as counsel in this action.

19 **B. Authority**

20 Federal Rule of Civil Procedure 26(b)(1) states:

21 Unless otherwise limited by court order, the scope of discovery  
22 is as follows: Parties may obtain discovery regarding any  
23 nonprivileged matter that is relevant to any party's claim or  
24 defense—including the existence, description, nature, custody,  
25 condition, and location of any documents or other tangible  
26 things and the identity and location of persons who know of any  
discoverable matter. For good cause, the court may order  
discovery of any matter relevant to the subject matter involved  
in the action. Relevant information need not be admissible at  
the trial if the discovery appears reasonably calculated to  
lead to the discovery of admissible evidence. All discovery  
is subject to the limitations imposed by Rule 26(b)(2)(C).

1 Rule 26(b)(1) is interpreted broadly and is premised on the principle  
2 that "[m]utual knowledge of all the relevant facts gathered by both  
3 parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S.  
4 495, 507 (1947); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351  
5 (1978). It is the requesting party's burden to establish that the  
6 discovery is relevant. There are, however, limits imposed on this broad  
7 discovery right. Rule 26(b)(2)(C) limits discovery if it is unreasonably  
8 cumulative or duplicative; is obtainable from another source that is more  
9 convenient, less burdensome, or less expensive; if there had been ample  
10 opportunity to obtain information by discovery; or the burden outweighs  
11 the likely benefit.

### 12 **C. Analysis**

#### 13 1. Subpoena Duces Tecum

14 The Court's March 6, 2006 Order addressed subpoena duces tecum  
15 subsections 2, 4, 5, 5a, and 7. Ms. Wynne objects to the remaining  
16 subsections, arguing that they request irrelevant and protected  
17 information.

#### 18 a. *Previously-addressed subsections*

19 Consistent with the Court's earlier Order, the Court finds the  
20 following documents and communications are relevant and discoverable to  
21 the extent they do not contain protected information:

22 Modified subsection 2: Any communications (either written,  
23 oral, or electronic) from August 1, 2005, to the present, which  
24 relate to the Settlement and Release Agreement and/or MA-10  
25 proceeds involving Defendant Evans, Defendant Gargan, and/or  
26 Ms. Wynne. In addition, Defendants shall disclose any  
communications (either written, oral, or electronic) from  
August 1, 2005, to the present, which relate to First Phoenix  
International or any other venture in which Defendant Evans is  
involved with either Defendant Gargan or Ms. Wynne.

1 Modified subsection 4: First Phoenix International's articles  
2 of incorporation, certificate of formation, bylaws, minutes,  
3 resolutions, and business plans from August 1, 2005, to the  
4 present.

5 Modified subsection 5: Any and all disclosures or waivers  
6 required by Washington Rule of Professional Conduct 1.8 as they  
7 relate to Ms. Wynne's representation of Sandra D. Evans.

8 Modified subsection 5a: All statements of account, checks  
9 and/or cancelled checks, and transactional documents relating  
10 to the Settlement and Release Agreement and MA-10 proceeds  
11 (deposits and transfers).

12 Modified subsection 7: All documents (written or electronic)  
13 and communications (written, oral, or electronic) that relate  
14 to the Settlement and Release Agreement or MA-10 proceeds,  
15 between August 1, 2005, to the present, by or between Defendant  
16 Evans, Defendant Gargan, or Ms. Wynne (or on their behalf) and  
17 Wright Wapato, Inc. (or on its behalf).

18 The Court agrees that Ms. Wynne as a non-party and Ms. Evans' prior  
19 counsel in the underlying events does not have the initial responsibility  
20 to produce this information and, therefore, places the initial disclosure  
21 burden on Defendants. See *Shelton v. American Motors Corp.*, 805 F.2d  
22 1323, 1327 (8th Cir. 1986). However, if Ms. Wynne is in custody or  
23 control of previously-undisclosed above-described documents or  
24 communications, Ms. Wynne is to produce the document or communication  
25 within three (3) weeks of Defendants' disclosures. If Ms. Wynne asserts  
26 a protection or privilege, she must comply with Rule 26(b)(5).

b. *Subsection 1*

Subsection 1 seeks the following information:

communications (including electronic documents of any kind or  
nature whatever) to and from the BIA (both the Colville Agency  
and Northwest Region), OST (Colville Agency and Northwest  
Region), the OFTM, the Department of Treasury of the United  
States, and the Colville Confederated Tribes which in any  
manner, however attenuated, relate or pertain to Sandra Evans  
for the period of time from 8/1/05 to present.

1 By limiting this request to the identified communications that relate to  
2 or pertain to Sandra Evans *and* (a) the Settlement and Release Agreement  
3 or (b) the MA-10 proceeds, the Court finds this modified subsection seeks  
4 relevant information and is not overbroad. Again, Ms. Wynne need not  
5 produce previously-disclosed communications. If Ms. Wynne asserts that  
6 a communication is privileged, she must comply with Rule 26(b)(5).

7           c.    *Subsection 3*

8           Subsection 3 demands the following:

9           [For the period of time from 8/1/05 to the present], any and  
10          all Powers of Attorney (including any and all amendments  
11          thereto) employment or retention or retainer agreements, any  
12          fee agreements, under which or in connection with which, Sandra  
13          Evans has designated you as her Attorney in Fact, or in any  
14          manner whatever, however formal or informal, Sandra Evans  
15          authorized, requested or ratified you to perform any services  
16          of any kind or nature whatever, including without limitation  
17          business services (as an agent, employee, partner, joint  
18          venture or in any other manner whatever) legal services,  
19          personal services, ad hoc services or any other services of any  
20          kind or nature whatever.

21          The Court finds subsection 3 seeks relevant information, but is  
22          overbroad. The Court modifies it as follows:

23          [For the period of time from 8/1/05 to the present], any and  
24          all Powers of Attorney (including any and all amendments  
25          thereto), employment or retention or retainer agreements, any  
26          fee agreements, under which or in connection with which, Sandra  
27          Evans has designated you as her Attorney in Fact, or in any  
28          manner whatever, however formal or informal, Sandra Evans  
29          authorized, requested or ratified you to perform any services  
30          in connection with the Settlement and Release Agreement, MA-10  
31          proceeds, First Phoenix International, or any other venture in  
32          which Ms. Evans is involved with either Dan Gargan or yourself.

1 Accordingly, Ms. Wynne must produce any modified subsection 3 documents  
2 not previously disclosed. If she asserts a protection, she must comply  
3 with Rule 26(b)(5).

4 d. *Subsection 6*

5 Plaintiffs seek discovery of the following:

6 [For the period of time from 8/1/05 to the present], any and  
7 all documents of any kind or nature which relate or pertain to  
8 any complaint filed with any Bar Association of any state of  
the United States asserting any form of misconduct by you, in  
any matter or connection whatever.

9 The Court finds the requested information is irrelevant to this breach  
10 of settlement agreement action, which includes an allegation that  
11 Defendant Gargan tortiously interfered with the settlement agreement.  
12 Ms. Wynne need not produce the information requested by subsection 6.

13 e. *Summary*

14 In summary, Ms. Wynne must produce any previously-undisclosed  
15 documents or communications requested by the modified subpoena duces  
16 tecum three (3) weeks following Defendants' disclosures.<sup>1</sup> If Ms. Wynne  
17 withholds a document or communication on the grounds that it is  
18 protected, she must comply with Rule 26(b)(5).

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21 <sup>1</sup> After Defendants' disclosures, Ms. Wynne will have a clearer idea  
22 as to what documents and communications she must produce. If Ms. Wynne  
23 seeks relief from her three-week disclosure timeline, she must file a  
24 motion, supported by a declaration setting forth specifically how many  
25 pages of documents she believes she must produce and the estimated length  
26 of time for production.

1           2.   Depositions

2           The Court earlier advised all parties that the Federal Rules of  
3 Civil Procedure must be complied with and quashed the previously-issued  
4 subpoena duces tecum because Plaintiffs failed to comply with Rule 45's  
5 geographic and monetary requirements. If Plaintiffs intend to depose Ms.  
6 Wynne, they must provide Ms. Wynne with attendance fees and mileage -  
7 either to Chandler, Arizona or Seattle, Washington if Plaintiffs elect  
8 to accept Ms. Wynne's offer to be deposed in Seattle. The deposition is  
9 limited to seven (7) hours unless the parties stipulate otherwise or  
10 Plaintiffs seek relief from the Court. Fed. R. Civ. P. 30(d).

11           3.   Discovery Costs

12           Rule 45(c)(1) requires the Court to protect persons subject to a  
13 subpoena duces tecum from undue burden or expense. This duty is at its  
14 apex where non-parties are subpoenaed. *United States v. CBS, Inc.*, 666  
15 F.2d 364, 371-72 (9th Cir. 1982) (noting that non-parties are powerless  
16 to control the scope of discovery and should not be forced to subsidize  
17 an unreasonable share of litigation costs). Factors to consider in  
18 determining whether reimbursement of a non-party's subpoena compliance  
19 expenses is appropriate are: 1) the scope of discovery; 2) the request's  
20 invasiveness; 3) the extent to which responsive information was separated  
21 from privileged or irrelevant material; 4) the reasonableness of the  
22 claimed production costs; and 5) the strength of each party and the non-  
23 party's position. *United States v. CBS, Inc.*, 103 F.R.D. 365, 367-78  
24 (C.D. Cal. 1984) (citing to *CBS*, 666 F.2d at 372 n.9).

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1 Although the Court is inclined to require the parties to pay for a  
2 portion - if not all - of Ms. Wynne's reasonable production costs, the  
3 Court declines to make a definitive ruling at this time. The Court will  
4 be in a better position to assess the relevant factors after Ms. Wynne  
5 has produced the documents and submitted a motion for production costs  
6 with an accompanying declaration setting forth the time and expenses  
7 incurred on various tasks, including whether Ms. Wynne ought to have been  
8 organizing relevant documents at an earlier time. The Court will also  
9 then assess which parties will pay for Ms. Wynne's reasonable production  
10 costs.

11 4. Summary

12 The Court grants and denies in part Ms. Wynne's motion. Ms. Wynne  
13 must produce the above-identified documents within three (3) weeks of  
14 Defendants' disclosures. Plaintiffs may take Ms. Wynne's deposition;  
15 however, they must comply with Rules 45 and 30. The Court will determine  
16 what parties are responsible for paying Ms. Wynne's reasonable production  
17 costs upon Ms. Wynne's filing of a motion seeking such relief following  
18 the production of documents

19 **D. Conclusion**

20 For the reasons given above, **IT IS HEREBY ORDERED:** Mary T. Wynne's  
21 Motion for Protective Order (**Ct. Rec. [227](#)**) is **GRANTED AND DENIED IN PART.**

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S/ Edward F. Shea  
EDWARD F. SHEA  
United States District Judge

ORDER \* 9